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IN THE

Supreme Court of the United States

October Term, 1964

No. 424

OUTDOOR AMERICAN CORPORATION, G. & L. DISTRIBUTORS, and GEORGE ROSENBLOOM, *Petitioners*,

v.

CITY OF PHILADELPHIA, HOWARD R. LEARY, JAMES C. CRUMLISH, JR., THE EVENING BULLETIN, TRIANGLE PUBLICATIONS, INC., and COLUMBIA BROADCASTING SYSTEM, INC., *Respondents*.

Brief of the Municipal Respondents In Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

Did the United States District Court abuse its discretion in refusing to grant injunctive relief where plaintiffs charged unconstitutional interference with the sale and distribution of nudist publications, where (a) criminal prosecutions were pending in the state court under the state obscenity statute, (b) there was no evidence that the state court would not properly apply Federal law, and (c) there was no evidence that failure to exercise Federal jurisdiction would result in irreparable injury which is clear and imminent?

(Answered in the negative by the Court of Appeals.)

STATEMENT OF THE CASE

The appellants, publisher and distributor of nudist magazines, brought suit in equity in the United States District Court for the Eastern District of Pennsylvania seeking the following relief: (1) a declaration that certain magazines and books seized by the Philadelphia police were not obscene, (2) an injunction restraining the appellees from interfering with the appellants' sale of said magazines and books, and (3) an order directing the return of the seized material.[1] It was not alleged that the Pennsylvania obscenity statute under which the police acted is unconstitutional. At the time the complaint was filed, George Rosenbloom, one of the appellants, and other newsdealers were under indictment charged with violation of the Pennsylvania obscenity statute[2] on account of their sale of the said material.

The United States District Court (Honorable John W. Lord, Jr.) granted the appellees' motion to dismiss the case stating (19a):

> "As has been said so many times, there is no reason to assume, at this stage, that the Courts of Pennsylvania will not do justice. The Pennsylvania statute, which plaintiffs are alleged to have violated, has not been challenged here. It is not for this Court to assume that the proper standards will not be applied in the interpretation of this statute."

The Court of Appeals for the Third Circuit sustained the order of the United States District Court and refused appellants' petition for reargument.

The petition for writ of certiorari herein followed.

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[1] In the proceedings before the U. S. District Court the complaint was dismissed as to the Evening Bulletin, Triangle Publications, Inc. and Columbia Broadcasting System, Inc. The dismissal as to these defendants was not thereafter contested.

[2] This statute is set forth in full in footnote 1, page 5, of appellants' petition for writ of certiorari.

ARGUMENT

The appellants herein raise two questions: (1) whether they had a right under the United States Constitution to have a hearing as to obscenity under a state statute before confiscation of their publications by the police, and (2) whether the Federal Courts should have exercised their jurisdiction in the present case.

The first question was at no time raised in the proceedings below either before the United States District Court or the United States Court of Appeals.[3] It is well settled law that an appellant may not raise for the first time questions not raised before or considered by the courts below, except under exceptional circumstances. *Lawn v. United States*, 355 U. S. 339, 2 L. ed. 2d 321, 78 S. Ct. 311 (1958); *Duignan v. United States*, 274 U. S. 195, 200, 71 L. ed. 996, 1000, 47 S. Ct. 566 (1927); *Husty v. United States*, 282 U. S. 694, 701, 702, 75 L. ed. 629, 632, 633, 51 S. Ct. 240, 74 A. L. R. 1407 (1931); *United Brotherhood C. & J. v. United States*, 330 U. S. 395, 412, 91 L. ed. 973, 987, 67 S. Ct. 775 (1947). There are no exceptional circumstances in the present case; the appellant could have raised this issue below and merely failed to do so.

[3] The Questions Involved as stated in appellants' brief before the U. S. Court of Appeals were as follows:

> "1. Where defendants' motion to dismiss are sustained by the lower court judge and plaintiffs' entire complaint is dismissed on the grounds that a federal court of equity will not interfere to prevent State authorities from using evidence obtained in an unlawful search in a pending criminal prosecution and that there was no reason to assume that the court of Pennsylvania will not do justice nor apply the proper standards in the interpretation of their 'Obscenity Statute' and where the plaintiffs asked for relief in addition to that, was such a dismissal proper?
>
> "2. Should a motion to dismiss on the grounds that a municipality is not subject to suit under the 'Civil Rights Statutes' be sustained?"

The second question, and the one decided by the court below, involves the discretion of the Federal Courts when confronted by a case in which it is alleged that state action denies rights guaranteed by the United States Constitution. The Court of Appeals stated the question as follows (22a):

> "Decisive of this appeal is the question whether the district court in the exercise of its discretion was correct in refusing to use its equitable power."

The Court of Appeals, citing and relying on an opinion of this Court continued (23a):

> "The decision of the state courts may result in plaintiffs' obtaining the objectives they now seek. If not, petition to the Supreme Court of the United States for writ of certiorari remains. As Mr. Chief Justice Stone for the Supreme Court in Douglas v. City of Jeannette, 319 U. S. 157, 163 (1943), stated:
>
> > 'Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds.'
>
> "Danger of irreparable injury both 'clear and imminent' has not been shown."

The appellants have basically misconceived the nature of this case and the action of the courts below. They fail to recognize that the Federal Courts have discretionary power to determine whether or not it is appropriate for them to intervene, where a charge is made that a person's constitutional rights are violated by state officials. Appellants state in their petition (p. 7):

> "The Court of Appeals affirmed the District Court's action on the grounds, among others, that it *could* not interfere with the State Court's function of determining obscenity." (Emphasis supplied.)

This is a misstatement of the legal position taken by the Court of Appeals. Nowhere in its opinion does it question the *right* of the Federal Courts to intervene where a claim is made of violation of Constitutional rights; its sole discussion deals with the *propriety* of exercising such a right. The question considered by both courts below was thus not whether they "could" interfere in the State administration of its statutes, but whether it "should". Moreover, nowhere is it conceded that it is "the State Court's function of determining obscenity." It is clearly recognized that this is ultimately a Federal question under the First Amendment of the United States Constitution.

The appellants urge two alleged reasons why this Court should grant a writ of certiorari: (1) that the judgment below conflicts with decisions of this Court (p. 7), and (2) that the question involved is of far-reaching importance in the administration of the Pennsylvania and other similar statutes and in the protection of the Constitutional guarantee against suppression of freedom of speech and the press (p. 11).

Neither of the two principal cases cited by the appellants is controlling. The present case deals with the propriety of the exercise of Federal equitable jurisdiction. The recent case of *A Quantity of Copies of Books et al. v. Kansas*,

—— U. S. —— 12 L. ed. 2d 809, decided June 22, 1964, is a case which reached this Court from the Supreme Court of Kansas. Similarly *Marcus et al. v. Search Warrant of Property*, 367 U. S. 717 (1961), came to this Court from the Supreme Court of Missouri. In both cases the merits of the administrative and judicial procedures used in the respective states to enforce their obscenity laws were squarely before this Court after having been passed upon by the highest courts of the States. By contrast, in the present case a complaint was filed in the United States District Court and ultimately argued before the Court of Appeals before any Pennsylvania Court had considered the matter.

The appellants also cite in a footnote (p. 10) three other decisions of this Court, each of which is clearly distinguishable from the present case and none of which would suggest a different result in the present case from that reached by the courts below herein.

Monroe v. Pape, 365 U. S. 167 (1961), involves a suit for damages under the Federal Civil Rights Act. This Court held that the individual officials, but not the municipality of Chicago by which they were employed, could be liable. This Court held that relief in the Federal Court was proper even though a State remedy existed. It did not, however, hold that the Federal Courts were obliged to take jurisdiction.

McNeese v. Board of Education, 373 U. S. 668 (1963), was an action in an Illinois United States District Court in which it was alleged that racial discrimination in the public schools existed and praying for certain equitable relief. The defense was that the plaintiffs had not exhausted their administrative remedies with the State Superintendent of Public Instruction. Here again this Court held that the Federal Courts could grant relief despite the existence of a State remedy. In discussion of the question of the propriety of the exercise of jurisdiction by the Federal Courts, this Court stated (p. 673):

> "Where strands of local law are woven into the case that is before the federal court, we have directed a District Court to refrain temporarily from exercising its jurisdiction until a suit could be brought in the state court. See Railroad Com. v. Pullman Co., 312 U. S. 496, 85 L. ed. 971, 61 S. Ct. 643; Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 84 L. ed. 876, 60 S. Ct. 628; Harrison v. NAACP, 360 U. S. 167, 3 L. ed. 2d 1152, 79 S. Ct. 1025. Thus we have stayed the hands of a Federal District Court when it sought to enjoin enforcement of a state administrative order enforcing state law, since any federal question could be reviewed when the case came here through the hierarchy of state courts. Burford v. Sun Oil Co., 319 U. S. 315, 87 L. ed. 1424, 63 S. Ct. 1098. The variations on the theme have been numerous."

It held that there was no "underlying issue of state law controlling this litigation" and that the district court below should have entertained jurisdiction. In the present case, the underlying issue of State law is obvious—the Pennsylvania Obscenity Statute.

Cantwell v. Connecticut, 310 U. S. 296 (1940), is a case which reached this Court from the Supreme Court of Connecticut. It reversed the conviction of a member of the religious group known as Jehovah's Witnesses for a violation of a statute requiring persons making religious solicitations to obtain a certificate from the local authorities. No question of the propriety of the exercise of jurisdiction is involved in this case.

The only two cases to which the appellants refer which dealt with the question involved in this case are *Grove Press, Inc. v. Calissi*, 208 F. Supp. 580 (N. J. 1962), and *Toth v. Gilbert*, 184 F. Supp. 163 (N. D., Ohio 1960). In both of these cases efforts were made to obtain Federal injunctions against interference with the publication and distribution of material claimed to be obscene by local authorities. In

both cases the Federal Courts refused to intervene relying on this Court's decision in *Douglas v. Jeannette*, 319 U. S. 157 (1943). It is submitted that, contrary to the appellants' assertion that these cases do not deal with the question here involved, in fact they are the only cases cited which do deal with it and they support the position of the appellees and the courts below.

The second reason why the appellants urge this Court to grant a writ of certiorari is its "far-reaching importance" in the administration of state obscenity statutes. This argument appears to be predicated on the assumption that the State Courts of Pennsylvania will not properly interpret and enforce the law as laid down by this Court. It is submitted by the appellees that such is not the case and that the courts below wisely refused so to conclude. It is well known that in certain states there is determined local opposition to the enforcement of certain provisions of the United States Constitution and Federal Statutes. In such cases Federal enforcement is required if the Federal law is to be enforced. Such is not the case in Pennsylvania, however. Indeed the fact that, since this action commenced, the individual plaintiff has been acquitted, by way of directed verdict, of violating the Pennsylvania Obscenity Act and most of his magazines returned to him is evidence that the State Courts can and will heed the decisions of this Court.[4]

If the position of the appellants were accepted, it would mean that every issue of every publication involving photographs of nude persons or text which might be regarded by some as obscene could become a case in the Federal Courts. The Federal Court would be defenseless to determine what matter they should and what they should not consider. The

[4] It is noteworthy that in a case which is a companion to the present case and arose from the same seizure as complained of in the present case, *Dale Book Co., Inc. v. Leary et al.*, decided on August 12, 1964 and referred to in footnote 7 of the petition for writ of certiorari herein, the U. S. District Court found the publications involved obscene.

appellants' position would place an enormous, if not impossible, burden on the Federal Courts. Indeed, the proposition they argue would apply not only to obscenity cases but all the wide variety of cases in which an individual might charge a violation of his rights under the United States Constitution or Federal law.

It is not the position of the appellees that close questions may not arise under the Pennsylvania Obscenity Statute or that the State authorities should manifest indifference to the right of free expression guaranteed by the First Amendment of the United States Constitution. However, it is their contention, concurred in by the courts below, that the Pennsylvania authorities can and will conscientiously and efficiently enforce these rights and that only after the Supreme Court of Pennsylvania has spoken and in dubious cases should a party be heard by this Court.

CONCLUSION

Wherefore, the appellees urge that Your Honorable Court deny a writ of certiorari in this case.

Respectfully submitted,

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